No. 82-1446

In the Supreme Court of the United States

OCTOBER TERM, 1982

LIFETIME COMMUNITIES, INC., PETITIONER

v.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals abused its discretion in refusing to consider an argument raised by petitioner for the first time in a "Motion to Supplement" its petition for rehearing, which was submitted four weeks after the court of appeals' decision and two weeks after expiration of the time within which to file a petition for rehearing.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-9) is reported at 690 F.2d 35. The opinion of the district court (Pet. App. A-12 to A-16) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 1982 (Pet. App. A-24 to A-25). A petition for rehearing was denied on December 1, 1982 (Pet. App. A-26 to A-27). The petition for a writ of certiorari was filed on February 28, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is the successor by merger to the rights and obligations of Fidelity Mortgage Investors, a rehabilitated debtor under Chapter XI of the now superseded Bankruptcy Act, 11 U.S.C. 701 *et seq.* That Act, as amended by

the Referees' Salary Act of 1946, ch. 512, 60 Stat. 327, 11 U.S.C. 68(c)(2) (repealed 1978), provided that "[a]dditional fees for the referees' salary and expense fund shall be charged, in accordance with the schedule fixed by the [Judicial Conference of the United States] * * *." Under the fee schedule promulgated by the Judicial Conference, the obligation of the debtor (and thus of petitioner) to the referees' fund is approximately $1.7 million (Pet. App. A-14). Petitioner's application to the bankruptcy court for a reduction or elimination of this fee was denied on November 25, 1980 (*ibid.*). Petitioner appealed to the district court, arguing that (1) the fee schedule was invalid because it had not been promulgated in accordance with the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, and (2) the size of the fee was "simply inequitable" in light of recent amendments to the bankruptcy law that, although not applicable to petitioner, had capped the referees' salary contribution in other bankruptcy cases for which confirmation had occurred at a later date.[1]

The district court affirmed the order of the bankruptcy court on December 17, 1981 (Pet. App. A-16). The district court observed: "The fee schedule was known at the time the debtor sought the protection of the bankruptcy court. The fee itself had to be figured into the successful arrangement under which the debtor now operates. What the appellant really seeks is a windfall to those who have accepted its

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[1]Under the 1970 fee schedule promulgated by the Judicial Conference, the referees' salary contribution was set at 3% of the first $100,000 of the assets distributed to unsecured creditors, plus 1.5% of the balance so distributed (Pet. App. A-14). Thereafter, Congress amended the bankruptcy law so as to limit the maximum contribution for the referees' salary to $100,000 for Bankruptcy Act cases "in which the plan is confirmed after September 30, 1978" (Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 403(e), 92 Stat. 2683). Because its plan was confirmed on January 4, 1978 (Pet. App. A-17), the limitation does not apply to petitioner. The bankruptcy court has not yet entered an order fixing the precise amount that petitioner must pay to the referees' salary fund.

newly issued stock" (*ibid.*). The district court's memorandum and order were filed on December 21, 1981 (*id.* at A-12).

On July 31, 1981, while petitioner's case was pending before the district court, H.R. 4353 was introduced in Congress. H.R. 4353, 97th Cong., 1st Sess.; 127 Cong. Rec. H5860 (daily ed. Aug. 1, 1981). This bill would have extended the cap on contributions to the referees' salary fund to cases "in which the final determination as to the amount of such fee is made after September 30, 1979, notwithstanding an earlier confirmation date" (127 Cong. Rec. H9808 (daily ed. Dec. 16, 1981)). The bill was approved by Congress on December 16, 1981 (*id.* at H9809, S15645); later that day, both Houses completed their work for the first session of the 97th Congress and adjourned sine die (*id.* at H9927, S15550). At the time H.R. 4353 was delivered to the President, the second session of the 97th Congress had not yet begun; that session did not convene until January 25, 1982 (128 Cong. Rec. H1, S1 (daily ed. Jan. 25, 1982)). Under the provisions of Article I, section 7, clause 2 of the United States Constitution, "[i]f any Bill shall not be returned by the President [to the Congress] within ten Days (Sundays excepted) after it shall have been presented to him * * * [and] the Congress by their Adjournment prevent its Return, * * * [the Bill] shall not be a Law." Thus, because the President declined to sign H.R. 4353, and because Congress was not in session from December 17, 1981, through January 24, 1982, H.R. 4353 did not become law.

On December 29, 1981, the President issued a "Memorandum of Disapproval," which set forth his objections to H.R. 4353. See 127 Cong. Rec. H9935 (daily ed. Jan. 6, 1982).[2] The President opposed H.R. 4353 on the ground

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[2]The Congressional Record of January 6, 1982, was composed primarily of summaries of prior legislative action and off-the-floor statements by Senators.

that it had been enacted "to benefit the creditors of a single large asset bankruptcy" and that he could not "support this effort to confer special relief in the guise of general legislation at a possible loss to the Treasury of $1.6 million" (*ibid.*). The President noted that "nothing except this debtor's dispute of the assessment distinguishes this one case from all others where the plan of arrangement was confirmed prior to September 30, 1978" (*ibid.*).

On January 20, 1982, several weeks after the "pocket veto" of H.R. 4353, petitioner filed a notice of appeal to the United States Court of Appeals for the Second Circuit. In its briefs petitioner urged that the referees' salary fund contribution be reduced on the same grounds it had presented to the district court, *i.e.*, that the fee schedule had not been promulgated in accordance with the Administrative Procedure Act and that its application to petitioner was "inequitable." See Pet. App. A-2. The court of appeals rejected these arguments and on August 23, 1982, affirmed the district court's order. *Id.* at A-1 to A-9. On September 7, 1982, petitioner filed a petition for rehearing. That petition, like petitioner's previous briefs, did not challenge the effectiveness of the President's veto of H.R. 4353.

On September 20, 1982, some two weeks after the expiration of the 14-day period within which to file a petition for rehearing (Fed. R. App. P. 40(a)), petitioner sought for the first time to challenge the effectiveness of the President's pocket veto of H.R. 4353. On that date, petitioner filed a motion with the court of appeals requesting that its petition for rehearing be "supplemented" to include the argument that the President lacks the constitutional authority to "pocket veto" bills during an intersessional recess by Congress. The only excuse offered by petitioner for the untimeliness of its motion was that its counsel had not learned until September 10, 1982, that the President's veto was a pocket veto (Affidavit of Wright H. Andrews, Jr., filed in support

of petitioner's motion for leave to file memorandum supplementing petition for rehearing). The government did not oppose petitioner's motion; although it was "confident that the President's veto of H.R. 4353 was well within his constitutional powers," the government "[i]n the interests of justice" agreed that the case should be reheard on that issue. See Pet. 7.

The court of appeals denied petitioner's motion to supplement, stating (Pet. App. A-10 to A-11):

> Appellant's motion * * * is denied.
>
> The mandate of the Court shall issue promptly following the determination of appellant's petition for en banc consideration in order that appellant may make a timely application in the district court for Rule 60(b) relief, if appropriate. *See Standard Oil Co. v. United States*, 429 U.S. 17 (1976).

The court of appeals subsequently denied the petition for rehearing (Pet. App. A-26).[3]

ARGUMENT

Petitioner's unsuccessful attempt to raise the effectiveness of the President's pocket veto of H.R. 4353 by what amounts to an out-of-time petition for rehearing does not warrant further review. Whether to accept such untimely filings is a matter within the discretion of the court of appeals. Petitioner offers no circumstances suggesting any abuse of discretion here. Moreover, petitioner failed to raise the pocket veto issue in its principal briefs before the court of appeals, although no reason prevented it from doing so.

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[3]In accordance with the court of appeals' suggestion, petitioner filed in the district court a motion for relief under Fed. R. Civ. P. 60(b). The government opposed that motion on the ground that none of the extraordinary circumstances enumerated under that rule exists in this case. The motion is currently pending.

For that reason, even if petitioner's filing had met the deadline for a petition for rehearing, the court of appeals would not have abused its discretion in declining to rule on the issue.

1. Fed. R. App. P. 40(a) provides in part:

> A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present.

The petition for rehearing filed by petitioner, like its briefs in the court of appeals and the district court, did not raise the effectiveness of the President's pocket veto of H.R. 4353. Petitioner first raised that issue by means of a "Motion to Supplement," filed September 20, 1982, which was 28 days after entry of the court of appeals' judgment and thus after the time for filing a petition for rehearing had expired. The "Motion to Supplement" was in effect a second petition for rehearing filed 14 days out of time, since the original petition did not "state with particularity" the pocket veto argument.

It is well established that a court may, in the exercise of its discretion, refuse to entertain an out-of-time petition for rehearing. See, *e.g.*, *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U.S. 131, 137 (1937). The rationale underlying that principle is evident. If a party could continually seek rehearing on different issues, both judicial economy and the public interest in finality would be compromised. As this Court has observed, such principles reflect "considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end

after fair opportunity has been afforded to present all issues of law and fact." *United States* v. *Atkinson*, 297 U.S. 157, 159 (1936). Thus, while the court of appeals could have granted the petition in order to consider the pocket veto issue (and we did not oppose the petition), the court acted reasonably and within its discretion in denying the petition.

2. Moreover, petitioner failed to address in its appellate briefs the constitutional issue it sought to raise in the out-of-time petition for rehearing. Petitioner had ample opportunity to learn about the President's pocket veto of H.R. 4353 and to raise its effectiveness in a timely fashion in the court of appeals, and perhaps even in a motion in the district court immediately after the veto.[4] The only reason petitioner offered for seeking to raise the issue so late in the day was, in effect, that it had not previously investigated the circumstances of the veto or thought of this line of argument (Pet. 6). But it is settled that, absent exceptional or jurisdictional circumstances, an issue an appellant does not raise and argue in its briefs to the court of appeals need not be considered by the court. See *Jamestown Farmers Elevator, Inc.* v. *General Mills, Inc.*, 552 F.2d 1285, 1295-1296 (8th Cir. 1977) (issue may not be raised for the first time in a petition for rehearing when it had not been raised previously in the trial court or the court of appeals); *Marion Steam Shovel Co.* v. *Bertino*, 82 F.2d 945 (8th Cir.), cert. denied, 299 U.S. 556 (1936) (on rehearing, appellant could not for the first time raise questions that were not urged on

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[4]Petitioner's counsel represent that they took an active role on behalf of petitioner, "seeking congressional passage of H.R. 4353, 97th Congress, First Session." Affidavit of Wright H. Andrews, Jr., Supporting Motion for Leave to File Memorandum Supplementing Petition for Rehearing at 1-2. However, they apparently did not inform the district court of the fact that Congress had passed the bill on December 16, 1981, or suggest to the court that it withhold filing of its memorandum and order in view of the congressional developments. The district court's memorandum and order were filed on December 21, 1981.

original hearing). See also *Brown* v. *Sielaff*, 474 F.2d 826, 828 (3d Cir. 1973); *United States* v. *Anderson*, 584 F.2d 849, 853 (6th Cir. 1978); *Chicago & Western Indiana R.R.* v. *Motorship Buko Maru*, 505 F.2d 579, 581 (7th Cir. 1974); *Mississippi River Corp.* v. *FTC*, 454 F.2d 1083, 1093 (8th Cir. 1972); *Platis* v. *United States*, 409 F.2d 1009, 1012 (10th Cir. 1969).

The court of appeals had discretion to consider the untimely constitutional issue, notwithstanding petitioner's failure to raise it in its briefs. However, the circumstances under which courts have exercised such discretion have generally been exceptional and have involved public interest considerations. See, *e.g.*, *Consumers Union of United States, Inc.* v. *FPC*, 510 F.2d 656, 662 (D.C. Cir. 1974) (resolution of case had important implications for the price American consumers would pay for natural gas); *Platis* v. *United States, supra*, 409 F.2d at 1012 (new government argument would be considered because public monies were involved). This case does not involve exceptional circumstances. Petitioner did not seek to bring to the court of appeals' attention events that occurred between submission of briefs and a decision by the court; to the contrary, the circumstances on which petitioner now relies arose well before it framed its arguments before the court of appeals. Compare *Huddleston* v. *Dwyer*, 322 U.S. 232 (1944) (court of appeals should consider the effect of a relevant state court decision issued *after* denial of the first petition for rehearing); *Braniff Airways, Inc.* v. *Curtiss-Wright Corp.*, 424 F.2d 427 (2d Cir.), cert denied, 400 U.S. 829 (1970) (same). Moreover, the issue petitioner sought to raise belatedly is not one that requires simply the mechanical application of a law that had been overlooked; rather, the issue of

the effectiveness of the President's pocket veto of H.R. 4353 presents difficult questions of constitutional law.[5]

Nor would grant of petitioner's motion to supplement have advanced any special public interest. H.R. 4353 was intended to function as a private law, affecting only petitioner. Thus, allowing petitioner an opportunity to litigate further the size of the fee it must pay into the referees' salary fund would not have benefited the public in general. The government was willing to have this case reheard so that the court of appeals could address the effectiveness of the President's pocket veto of H.R. 4353, and stated that such rehearing would be in the interests of justice. However, the government's acquiescence in petitioner's belated motion did not require the court to consider the new issue. Thus, the government's position before the court of appeals is not inconsistent with the conclusion that the court did not

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[5]In *The Pocket Veto Case*, 279 U.S. 655, 672 (1929), this Court held that a bill does not become law if that bill "is passed by both Houses of Congress during the first regular session of a particular Congress and presented to the President less than ten days (Sundays excepted) before the adjournment of that session, but is neither signed by the President nor returned by him to the House in which it originated." In the course of its opinion, the Court emphasized that the same result would occur, even if Congress should make provision for delivery "to an officer or agent of the House, for subsequent delivery to the House when it resumes its sittings at the next session * * *" (*id.* at 684).

Petitioner, in its memorandum to the court of appeals, relied on *Kennedy* v. *Sampson*, 511 F.2d 430 (D.C. Cir. 1974), which held that *intrasession* adjournments by Congress do not prevent the President from returning bills to Congress without his signature, at least so long as Congress authorizes officers to accept returns during such adjournments. Petitioner also relied on *Kennedy* v. *Jones*, 412 F. Supp. 353 (D.D.C 1976). In that case, Senator Kennedy sought to challenge, inter alia, the validity of an *intersession* pocket veto, like that upheld by this Court in *The Pocket Veto Case, supra.* However, the district court in *Kennedy* v. *Jones* addressed only issues of justiciability. Since the defendants had consented to entry of judgment on behalf of the plaintiff, the district court did not discuss the merits of the case.

abuse its discretion in declining to rehear the case. This conclusion is reinforced by the availability in appropriate circumstances, noted by the court of appeals (Pet. App. A-11), of a remedy under Fed. R. Civ. P. 60(b), under which a court may relieve a party from a final judgment if that judgment was occasioned by "mistake, inadvertence, surprise, or excusable neglect," or for other specified equitable reasons.

3. Petitioner's contentions that the court of appeals erred in denying its "Motion to Supplement" are without merit. Petitioner relies exclusively on cases such as *Huddleston* v. *Dwyer, supra*, and *Bradley* v. *School Board of Richmond*, 416 U.S. 696 (1974), which hold that the reviewing court should determine a case on the basis of the "law in effect at the time it renders its decision." *Id.* at 711. In those cases the Court addressed changes in the law that could not have been preserved in the trial court or properly presented to a reviewing court —*e.g.*, because of a change in law *after* the trial court determination, as in *Bradley*, or *after* the filing of a petition for rehearing in the court of appeals, as in *Huddleston*. But such circumstances do not exist here.

Unlike the litigants in *Bradley* and *Huddleston*, petitioner had ample opportunity to make its argument in the court of appeals in a timely manner. The President's pocket veto of H.R. 4353 took place within ten days of the filing of the district court's order. Under *Bradley* and *Huddleston*, petitioner would have been entitled to raise the validity of the pocket veto in its appeal to the court of appeals or perhaps in a pre-appeal motion in the district court. Petitioner did not do so, although it appears to have been aware of the relevant events surrounding the passage of H.R. 4353. See page 7 note 4, *supra*. Moreover, it was clear in *Bradley* and *Huddleston* that there had been a change in the law. Here, there was no official publication of a new statute,

so that the court below could not rely on a generally accepted source to confirm the alleged change. In addition, the government takes the position that the President's pocket veto was effective and that the alleged change in the law never occurred. Thus, unlike the parties in *Bradley* and *Huddleston*, petitioner was asking the court below not only to apply a change in the law, but to make a preliminary determination that such a change had taken place. Accordingly, *Bradley* and *Huddleston* do not support petitioner's contention that the court of appeals abused its discretion in declining to allow petitioner belatedly to mount a fresh challenge to the district court's decision.[6]

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[6]Petitioner also cites *Fusari* v. *Steinberg*, 419 U.S. 379, 387 & n.12 (1975), in which this Court remanded for consideration of amendments to the Connecticut statute governing the procedures under consideration and criticized counsel for failing to inform the Court about the existence and significance of the amendments. *Fusari* is distinguishable from petitioner's case. In *Fusari*, unlike this case, there was no question that the Connecticut statute had been amended; moreover, the amendments had become effective while the case was pending before the Supreme Court and came to the Court's attention before its decision issued.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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